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8 **UNITED STATES BANKRUPTCY COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA, DIVISION 5**

10 In re

11 GEORGE EARL WEISEL, dba ONE
12 CALL PROPERTY SERVICE and
ANGELINA CECILIA WEISEL,

13 Debtors.
14
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Case No. 09-56955-RLE

Chapter 13

DATE: September 16, 2010

TIME: 2:00 p.m.

ROOM: 3099

16 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
17 **MOTION TO VALUE COLLATERAL AND AVOID LIEN**

18 COMES NOW Debtors George Earl Weisel and Angelina Cecilia Weisel and
19 submit their Memorandum of Points and Authorities in Support of Motion to Value
20 Collateral and Avoid Lien of CitiMortgage, Inc. as follows:

21 **MEMORANDUM OF POINTS AND AUTHORITIES**

22 **LEGAL ARGUMENT**

23 1. **Overview**

24 Rule 3012 of the Federal Rules of Bankruptcy Procedure deals with the
25 procedure in the valuation of a secured claim. It reads in pertinent part: "The court may
26 determine the value of a claim secured by a lien on property in which the estate has an
27 interest on motion of any party in interest ..." As the Debtors in the present case,
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1 George Earl Weisel and Angelina Cecilia Weisel are parties in the present case,
2 George Earl Weisel and Angelina Cecilia Weisel are parties “in interest” within the
3 meaning of F.R.B.P. 3012 and may therefore assert their rights to present this motion to
4 the court.

5 Bankruptcy Code Section 506(a)(1) states that an allowed claim secured by a
6 valid lien on certain property is secured to the extent of “the value of such creditor’s
7 interest in the estate’s interest in such property.” In interpreting this section, the
8 Supreme Court has equated the quoted language with “value of the collateral.” See
9 United Savings Ass’n of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365
10 (1988).

11 Section 506(a)(1) provides a flexible, case-by-case standard under which the
12 court should determine the value of collateral “in light of the purpose of the valuation
13 and of the property disposition or use of such property...” This standard suggests that
14 the court’s determination of the collateral’s “market value” is a function of both the
15 debtor’s proposed use of the collateral and the procedural contest of the bankruptcy
16 case. Therefore, as is the case herein, if a Chapter 13 debtor proposes to retain the
17 collateral under their plan, a court evaluating the debtors’ plan should value the
18 collateral based on its “replacement value” —i.e., the price that it would cost the debtor
19 to purchase similar property in a market transaction. 11 U.S.C. Section 506(2)(2). See
20 Associates Commercial Corp. v. Rash, 520 U.S. 953 (1997), which held that the
21 replacement value is the appropriate measure in the contest of a Chapter 13 debtor’s
22 proposal to retain collateral over the objection of a secured party. Here, the Debtors
23 claimed a market value for their home of \$468,500.00 based upon a report from
24 Zillow.com and upon their personal knowledge as the Property owners.

25 11 U.S.C. Section 1322(b)(2) provides that a chapter 13 plan may: “modify the
26 rights of holders of secured claims, **other than a claim secured only by a security**
27 **interest in real property that is the debtor’s principal residence, ...**” (emphasis
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1 added). In this case, James Parivash, Effat Parivash and New Englasd Glass & Door,
2 Inc. (hereinafter the "Lienholders") hold an Abstract of Judgment against the Debtors'
3 principal residence. Notwithstanding, a chapter 13 plan may utilize section 1322
4 section 1322(b)(2) to modify and "strip" a junior lien from a principal residence where
5 the Court, pursuant to a value determination under section 506(a), determines the value
6 of the residence is less than the amount owed to senior lienholders, and that the junior
7 creditor's lien, thus, is wholly unsecured. See, Zimmer v. PSB Lending Corp., (In re
8 Zimmer), 313 F.3d 1220 (9th Cir. 2002); Lam v. Investors Thrift, (In re Lam), 211 B.R. 36
9 (9th Cir. BAP 1997). In this case, the evidence establishes that CitiMortgage, Inc. is a
10 wholly unsecured creditor.

11 2. Debtors are Entitled to File Their Chapter 13 Case and To Confirm a
12 Chapter 13 Plan.

13 The Debtors' receipt of a discharge in their Chapter 7 case precludes any
14 discharge in this case. 11 U.S.C. section 1328(f). The Debtors' inability to obtain a
15 discharge, however, does not bar the filing of their chapter 13 case. See, *Johnson v.*
16 *Home St. Bank*, 501 U.S. 78, 87 (1991); *In re Bateman*, 515 F3d. 272, 281 (4th Cir.
17 2008). And the prior discharge of Debtors' personal liability to Lienholders does not
18 limit Debtors' ability to include Lienholders' *in rem* claim in their chapter 13 Plan.
19 *Johnson*, 501 U.S. at 81-87. Thus, in cases involving a prior discharge, a chapter 13
20 plan may be confirmed if it otherwise meets the confirmation requirements of section
21 1325. *Johnson*, 501 U.S. at 87-88; *In re Sanders*, 368 B.R. 634, 640 (Bankr. E.D.,
22 Mich. 2007).

23 In *In re Picht*, 2009 w.l. 1766820 (Bankr. D. Kan. 2009), the Bankruptcy Court
24 analyzed related issues and determined that discharge was not required prior to a lien
25 strip. The *Picht* Court analyzed the availability of a section 1322(b)((2) lien strip in a
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1 non-discharge case involving an under-secured claim.¹ The junior mortgage holder
2 alleged that sections 1325(a)(5) and 1328(f) barred the lien strip because a discharge
3 was unavailable. *Picht*, 2009 WL 1766820, at p. 2. The *Picht* Court found these
4 arguments unavailing. Holding that “discharge is not a necessary predicate to require
5 the Bank to release its lien” the Court noted that section 1325(a)(5)(B) requires
6 retention of the lien until the underlying debt - - as determined under non-bankruptcy
7 law - - is paid in full or discharged under section 1328, but also required lien retention
8 upon dismissal or conversion without completion of the plan. *Picht*, 2009 WL 1766820
9 at p. 3. The *Picht* Court found it significant that plan completion - - separate and apart
10 from receiving a discharge - - is a “trigger to satisfaction of the creditors’ lien.” *Picht*,
11 2009 WL 1766820 at p. 5. The *Picht* decision thus supports the conclusion that where
12 the creditor receives an appropriate payment - - even zero in a Chapter 13 case
13 following the entry of a discharge in a prior Chapter 7 if the junior mortgage is wholly
14 unsecured - - the lien strip is final upon plan completion notwithstanding the
15 unavailability of a discharge.

16 In re Jarvis, 390 B.R. 600 (Bankr. C.D. Ill. 2008): The Jarvis case is a non-
17 binding bankruptcy court decision that is distinguishable from the case at bar in one
18 critical aspect. In Jarvis, the debtor sought an immediate order stripping off the
19 unsecured deed of trust from his residence upon confirmation of his Chapter 13 Plan.
20 To that end, the debtor’s plan contained the following provision: “As such claim is fully
21 unsecured, the claim of Heartland Credit Union is void with respect to 11 U.S.C. Section
22 506(d) and such security interest is hereby stripped off upon confirmation of Debtor’s
23 Plan.” Jarvis, 390 B.R. at 602 (emphasis added). In contradistinction to the language in
24 the Jarvis plan, the Debtors in the case at bar seek to strip off the unsecured deed of
25 trust of GreenPoint Mortgage Funding, Inc., et al. contingent upon completion of all
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27 ¹The *Picht* Court found that section 1322(b)(2) did not bar a lien strip on the
28 Debtor’s residence because the loan was initially secured by collateral in addition to a
lien on Debtor’s residence.

1 payments required under their Chapter 13 plan. (See Prayer for Relief, paragraph 2 on
2 page 3 of the Debtors' Motion to Value Collateral and Avoid Lien.)

3 The court's rationale in Jarvis for denying the debtor's attempt to lien strip was
4 that "such modification has traditionally only been achieved through a discharge. ... [but
5 not where] a case is dismissed or converted." Jarvis, 390 B.R. at 606. While that
6 statement is technically correct, it is equally true that lien stripping has traditionally - - in
7 pre-BAPCPA cases - - only been achieved through completion of the debtor's Chapter
8 13 plan payments. Prior to the passage of BAPCPA, a debtor, even a debtor who filed a
9 Chapter 13 bankruptcy following receipt of a Chapter 7 discharge, was entitled to
10 receive a discharge upon completion of his Chapter 13 plan. Therefore, any dicta in
11 pre-BAPCPA cases about lien stripping being "contingent upon receiving a discharge"
12 is irrelevant to post-BAPCPA cases because discharge was automatic in those earlier
13 cases, so long as the Debtor completed his plan. Such pre-BAPCPA cases are cited in
14 Jarvis at page 604. All are distinguishable from the case at bar for the reason stated
15 above. For that reason, the Jarvis court's reliance on those cases is unjustified.

16 In re Lilly, 378 B.R. 232 (Bankr. C. D. Ill. 2007): The Lilly case is a non-binding
17 bankruptcy court decision which is distinguishable from the case at barr because it dealt
18 with whether or not a Chapter 13 plan filed by a debtor in a no-discharge Chapter 13
19 case could permanently modify the interest rate payable on a 910 car claim. Moreover,
20 the Lilly case is distinguishable because, unlike in the case at barr, in Lilly the secured
21 creditor objected to confirmation of the debtor's plan. In addition, although this fact
22 was not expressly stated by the court, it appears that the 910 car claim was incurred by
23 the debtor between the filing of her Chapter 7 and Chapter 13 Petitions. The only
24 reference in Lilly to the time period in which the debtor purchased the vehicle is found
25 at page 233 where the court states that "AFS holds a claim secured by a 2005 Chrysler
26 Sebring that the Debtor purchased within 910 days of the filing of the petition." Lilly,
27 378 B.R. at 233. However, upon reviewing the objection of AmeriCredit Financial
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1 Services, Inc. to confirmation of the debtor's proposed Chapter 13 plan, filed on
2 February 15, 2007, we see that the debtor filed her Chapter 7 petition on June 14,
3 2004, purchased the vehicle on June 28, 2006, and filed her Chapter 7 petition on
4 January 3, 2007. The fact that the 910 car claim did not exist when the debtor filed her
5 Chapter 7 petition and therefore was not subject to the debtor's Chapter 7 discharge
6 makes Lilly inapposite to the case at bar. That fact aside, the concept of lien stripping
7 of wholly unsecured junior deeds of trust - - which expressly applies only to junior deeds
8 of trust on a debtor's principal residence - - has no applicability whatsoever to the issue
9 to whether or not a debtor can modify the interest rate on a car loan. Such loans, as in
10 the Lilly case, are typically the only lien on a debtor's vehicle and can therefore never
11 be wholly unsecured.

12 In re Gounder, 266 B.R. 879 (Bankr. E.D. Cal. 2001): The Gounder case is a
13 non-binding pre-BAPCPA case. The pertinent facts in Gounder were that the debtors
14 filed a Chapter 7 petition, received a discharge, filed a Chapter 13 plan in which they
15 stripped off the wholly unsecured deed of trust recorded by Real Time Solutions, Inc.,
16 and then objected to the unsecured Proof of Claim filed by the creditor. The court
17 overruled the debtors' objection to claim and held that the creditor is entitled to be paid
18 as an unsecured claim along with other unsecured claims through the debtors' Chapter
19 13 plan, notwithstanding the fact that the debtors' personal liability to the claimant had
20 been discharged in their Chapter 7 case. Gounder 266 B.R. at 881.

21 In re Julie Bollerud, case no. 08-12177 dated June 1, 2009, an unpublished
22 decision by Judge Laura S. Taylor of the U.S. Bankruptcy Court for the Southern
23 District of California:

24 This non-binding decision is exactly on point with the case at bar. There, Judge
25 Taylor concluded that a debtor in a non-discharge Chapter 13 case can lien strip an
26 unsecured deed of trust, so long as the debtor completes all payments required under
27 her plan. An important consideration in the Bollerud case was that the creditor did not
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1 object to confirmation of the debtor's plan and did not oppose the lien strip motion.
2 Likewise, in the present case, Lienholders did not object to the Debtors' plan.
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4 **CONCLUSION**

5 For the foregoing reasons, and based upon the legal arguments and facts set
6 forth in this Motion and the Declaration of George Weisel filed herewith, Debtors
7 request the Court grant the Motion to Value Collateral and Avoid Lien.

8 Dated: August 12, 2010

BINDER & MALTER, LLP

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10 By: /s/ Michael W. Malter
11 Michael W. Malter
12 Attorney for Debtors
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